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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 253

UNITED STATES OF AMERICA, APPELLANT

v.

THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the specially constituted district court in the original antitrust suit (R. 726) is reported in 50 F. Supp. 123. The opinion on the form of judgment (R. 759) is reported in 53 F. Supp. 908. The opinion sur judgment (R. 774) is reported in 55 F. Supp. 985. The opinion upon application for approval of sale of stock of the Pullman Company (R. 1193) is reported in 64 F. Supp. 108.

JURISDICTION

The judgment of the District Court was entered on January 4, 1946 (R. 1203). A petition for

appeal was filed on March 4, 1946 (R. 1206) and was allowed on the same day (R. 1209).

The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Sec. 29, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. Sec. 345. Probable jurisdiction was noted on October 14, 1946 (R. 2639).

QUESTION PRESENTED

In an antitrust suit designed to break up a complete monopoly in both the operating and servicing as well as in the manufacture of sleeping cars, the District Court found that such dual monopoly existed in a single concern, Pullman Incorporated, a holding company owning the Pullman Company, which operated and serviced virtually all sleeping cars moving in interstate commerce, and Pullman-Standard, which manufactured practically all such cars. The court ordered the complete and perpetual separation of the business of operating and servicing from the business of manufacturing sleeping cars; abolished the contracts which had given to the Pullman Company the exclusive right to furnish, operate and service sleeping cars on the lines of the several railroads; and required that Pullman operate and service all cars upon reasonable and nondiscriminatory terms. There was no appeal from this decree. Pullman Incorporated elected to sell

the operating company, the Pullman Company, and to retain its manufacturing company, Pullman-Standard. Four offers to purchase the operating company were made: one was made by a combination of railroads operating on their lines virtually all of the sleeping car service in the United States, and the other three offers were made by independent groups.

The District Court approved the offer made by the railroads; and the question presented here is whether, in these circumstances, the court's decree properly discharged its obligation to take such action as would be appropriate to dissipate the effects of the illegal monopoly which it found, or whether, as the Government has contended, the decree was improper because acceptance of the railroad offer would itself give rise to a monopolization and restraint of interstate commerce which would be as violative of the antitrust laws as that struck down by the original judgment of the court.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, commonly known as the Sherman Act, provides in part as follows:

> Sec. 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared

to be illegal * * *. (15 U. S. C. Sec. 1.)

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *. (15 U. S. C. Sec. 2.)

* * * * *

Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * (15 U. S. C. Sec. 4).

STATEMENT

PRIOR PROCEEDINGS IN THE CASE

A brief review of the original proceedings against the Pullman Group is necessary to a clear understanding of the issues now before this Court. On July 12, 1940, the United States filed a civil suit charging The Pullman Company, Pullman-Standard Car Manufacturing Company, Pullman Incorporated, Pullman Car & Manufacturing Corporation of Alabama, and thirty-one officers and

directors of such companies with conspiring and combining to restrain and monopolize trade and commerce among the several states of the United States in the manufacture, sale, operation, and servicing of sleeping cars, in violation of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act (R. 12–59).

At the time the suit was filed The Pullman Company (hereinafter sometimes referred to as "Pullman") owned and operated virtually all sleeping cars moving in interstate commerce. The Pullman-Standard Car Manufacturing Company (hereinafter sometimes referred to as "Standard"), manufactured practically all the sleeping cars manufactured in the United States. Pullman Incorporated was a holding company which owned all of the stock of Standard and virtually all of the stock of Pullman. (R. 13–14.)

The complaint charged that the defendants had violated the antitrust laws by: (1) monopolizing the furnishing and operating of sleeping cars; (2) monopolizing the manufacture and sale of sleeping cars; (3) combining and conspiring to restrain and monopolize the furnishing and operation of sleeping cars; (4) combining and conspiring to restrain and monopolize the manufacture and sale of sleeping cars; and (5) entering into exclusive dealing contracts with the railroads which substantially lessened competition and tended to create a monopoly in the operation

of sleeping cars and in the manufacture and sale of all sleeping cars (R. 20–56).

The Attorney General filed a certificate under the Expediting Act of February 11, 1903, 15 U. S. C., Sec. 28, and a three-judge court consisting of Circuit Judges John Biggs, Jr., Albert B. Maris and Herbert F. Goodrich, was designated to hear and determine the cause (F. 597–598).

The District Court found that the defendants had violated the Sherman Act (R. 726, 743), and filed findings of fact and conclusions of law in accordance with its opinion (R. 744–758). The defendants did not appeal.

The District Court found that the defendants enjoyed a complete monopoly in the business of furnishing and servicing sleeping cars to the railroads (R. 754, 758). It found further that by furnishing cars under exclusive service contracts with the several railroads, the defendants had a complete monopoly in the manufacture of sleeping cars (R. 758). It found that Pullman had acquired a monopoly in the business of furnishing and servicing sleeping cars by the acquisition of competitors, although no predatory practices were indulged in making such acquisitions (R. 746–749); that having achieved an operating monopoly, Pullman then took such steps as were necessary to repel all competition. The court found that a basic feature of Pullman policy was to make contracts with the railroads which provided

that Pullman was to have the exclusive right to furnish all of the sleeping car service on the lines of the contracting railroads as a condition to the furnishing of any service; that such contracts were made for a long period of time; and that the security inherent in these long-term contracts was buttressed by staggered termination dates, so as to permit Pullman to negotiate with the railroads one at a time (R. 731). The District Court found further that Pullman would operate and service only cars owned by it, and that it would purchase cars only from Standard, thus giving Standard a monopoly in the manufacture of sleeping cars (R. 731, 753). Finally, the court pointed out that the rails had a financial stake in the Pullman system, since Pullman had forced the rails to pay their pro rata share in depreciation on all the Pullman cars, as well as to pay the Pullman Company's amortization for high-speed betterments, such as air conditioning on Pullman cars. It was pointed out that Pullman in certain instances charged as repairs to be paid out of earnings, equipment which were in fact capital expenditures extending the service life on the vehicle on which they were made. (R. 736, 738.)

The District Court found further indication of monopolistic control in Pullman's policy of requiring that the rails guarantee it an operating profit on any cars furnished regardless of business conditions (R. 738). Although stating that the fact that Pullman was intimately associated

with other large business enterprises, especially railroad transportation, through common directorates, did not, standing alone, violate the Sherman Act, the court did find that Pullman enjoyed an advantage in having such connections directly with railroads or with railroad financing (R. 738–739).

Thereafter, both the Government and the defendants submitted a form of proposed judgment. The major subject of dispute related to the extent to which the tri-party relationship among Pullman, Pullman Standard and Pullman Incorporated should be affected. The Government insisted that Pullman Incorporated be required to dispose of Pullman Standard. Defendants argued that separation was not necessary since elimination of the exclusive dealing features between Pullman and the rails and the establishment of an open market in the purchase of sleeping cars would achieve all that the findings and the opinion of the court required. (R. 759–761.)

The court, in a divided opinion (R. 759),[1] held that the public interest required the complete

[1] The Court was unanimous in holding that there must be a complete separation in the ownership and direction of the business of manufacturing and the business of operating sleeping cars (R. 759). Judge Biggs dissented in part on the ground that Pullman Incorporated should be required to sell the manufacturing company (R. 761–763). The majority held that Pullman Incorporated should be permitted to make its own election as to which company, operating or manufacturing, it should sell (R. 760).

separation in ownership and direction of the business of manufacturing and the business of operating sleeping cars, but left to Pullman Incorporated the choice of which of its two businesses it should continue to own and operate.

The final judgment (R. 764–773), entered May 8, 1944, provided, *inter alia,* for the following: Complete and perpetual separation of the sleeping car business from the manufacturing business, and complete and perpetual separation of the ownership and control of each business from the other were to be effected. There was to be no ownership by one company of the other, by stockholdings or other securities, and no common officers or directors. Neither company was to engage in the same type of business as the other. All clauses in existing contracts between Pullman and the rails giving Pullman the exclusive right to furnish, service, or furnish and service all sleeping cars on any railroad were declared void and similar contracts for the future were enjoined. As long as it remained in business Pullman was required to furnish through-line operation between any two or more roads requiring such service on reasonable and non-discriminatory terms. Similarly, Pullman was required to operate and service any railroad-owned cars, and to service or furnish and service sleeping cars on any line of any railroad to the extent that cars were available even though cars were furnished, serviced, or furnished and serv-

iced on other lines of the same railroad by the railroad itself or by some third party. Pullman was required also to furnish any railroad with cars from the pool of sleeping cars owned and operated by Pullman, to the extent that cars were available, to meet peak or seasonal demands, regardless of whether Pullman had a contract with such railroad under which Pullman was to furnish, service, or furnish and service, sleeping cars to meet all or a part of the normal requirements of such railroad.

Pullman Incorporated was required to file with the court within 90 days of the effective date of the order its election of which company, manufacturing or operating, it would sell, as well as to submit to the court for approval a plan to effectuate such separation (R. 766). Such plan was to be carried out within one year after approval by the court (R. 767). The decree provided that, from and after approval by the court of a plan for separation, Pullman should sell to any railroad having an operating contract with Pullman and desiring to buy, used sleeping cars on such terms as should be set forth in the order of the court approving the plan of separation. The rails were required to exercise this right to purchase within six months of the expiration or other termination of the contract. (R. 769.) The decree contained the usual clause retaining jurisdiction for the purpose of carrying out its provisions or for such modifications, vacations, or directions as might be necessary and appropriate (R. 773).

THE OFFER TO SELL BY PULLMAN INCORPORATED

On October 2, 1944, Pullman Incorporated elected to retire from the sleeping car business. Its plan (R. 775–806) consisted of an offer to negotiate with the railroads for sale to them of the properties and assets of The Pullman Company at a price of approximately $75,000,000, which represents a gross value of approximately $81,000,000 with certain accounting adjustments (R. 791–795). The proposal suggested sale of Pullman property and assets to a new corporation to be jointly owned by those railroads most interested in the future handling of the sleeping-car business. It was proposed that the new company take over Pullman's sleeping-car properties and organization of officers and employees for conducting the business.

On March 22, 1945, the court, after a hearing, entered an order (R. 958) permitting Pullman Incorporated to offer to treat with the railroads or with any other persons for the sale of the sleeping car business owned by Pullman. Pullman Incorporated was authorized to sell the stock of Pullman. No cars were to be sold without the court's approval.

On May 12, 1945, Pullman Incorporated offered to sell the stock of the Pullman Company to a commonly owned railroad sleeping-car company under substantially the same terms as it had offered previously to sell the properties and assets of such company (R. 2246). On June 26, 1945,

Pullman served written notice on each contract railroad exercising Pullman's right under its existing operating contract with the several railroads to terminate such contract as of December 31, 1945. Such action was taken pursuant to Pullman's election to retire from the sleeping-car business as of that date. (R. 1146, 1154.)

THE RAILROAD OFFER TO BUY

Four groups submitted offers to purchase the stock of The Pullman Company.[2] Each group was permitted to intervene[3] (R. 1003, 1063, 1141, 1170). Since the question here is whether the court erred in approving the rail offer, we shall set forth only that offer in detail.[4]

The property of The Pullman Company falls within the following classification: (1) heavy

[2] The non-rail offers were submitted by Otis & Co. (R. 984); Glore, Forgan & Co. (R. 1056); and Standard Steel Spring Co. (R. 1113).

[3] The several petitions to intervene by various employee groups of The Pullman Company were also granted (R. 817, 868, 899, 939, 956, 983) as was a joint petition by the States of Colorado and California (R. 1112).

[4] Each of the four offers agreed to meet Pullman's asking price of $75,000,000 and hence price was not an issue. Originally the rail offer was for a sum approximately $17,000,000 less than Pullman's asking price. The rails claimed such deductions for excess depreciation costs borne by them under their operating contracts with Pullman, for deferred maintenance costs occasioned by the War, and for obsolescence on certain cars which was not included in depreciation charged against such cars. (R. 1141.) After hearings on all four offers the rails raised their offer to meet Pullman's asking price (R. 1173–1174).

weight sleeping cars; (2) lightweight sleeping cars; (3) fixed property (such as shops, laundries, with land and machinery) and supplies and materials; and (4) cash working capital and miscellaneous intangible property (R. 778–779).

The rail plan[8] provides that before the railroads take over Pullman each of the participating railroads to which lightweight cars are assigned shall purchase such cars from Pullman. The cars so purchased are to be leased back to the railroad-owned Pullman Company for operation over routes designated by the individual owners. (R. 1165.) The same lease arrangements are applicable to all new lightweight sleeping cars which may be acquired by individual roads during the term of the lease (R. 1165).

The plan provides that Pullman will offer to sell to any railroad on the basis of unrecovered cost or scrap value, whichever is greater, any heavyweight sleeping cars regularly assigned to operation on such road, and shall offer to sell unassigned cars on the same price terms, but only to the extent that such cars are available without

[8] At the time of filing its offer the railroad buying group consisted of twenty carriers doing more than eighty percent of the sleeping-car business in the United States (R. 1143). The District Court was subsequently orally advised that sixteen additional carriers doing approximately 10 percent of the country's sleeping-car business became members of the railroad buying group as of December 1, 1945. In addition, the remaining carriers indicated that steps would be taken to permit them to become members of the buying group in the event the rail plan was approved and carried out.

impairment of the function of the pool of reserve cars (R. 1165–1166). The plan provides, however, that no car be it lightweight or heavyweight, will be sold to a member of the Buying Group unless it is covered by lease to the pool, and all roads leasing assigned sleeping cars will be required to enter into operating contracts (R. 1165). Generally, the cars assigned to individual roads will be the specific cars or types of cars which were assigned during the calendar year 1940. (R. 1165.)

These plans are to be operative for an interim period of three years, or until December 31, 1948, unless at some date prior thereto, Pullman is sold to an outside sleeping car service corporation (R. 1164). The right of individual railroads to purchase the regularly assigned heavyweight cars expires at the termination of the interim period (R. 1166). However, whether such right to purchase is exercised or not, all heavyweight cars regularly assigned to members of the Buying Group are to pass into individual railroad ownership by December 31, 1948 (R. 1167), by virtue of the notes which are described below.

Under the plan, the Railroad Buying Group is to purchase the outstanding capital stock of The Pullman Company from Pullman Incorporated for approximately $40,000,000 in cash. This is a net price, after giving effect to the prior sale, by Pullman, of the lightweight cars. The plan requires the individual railroad participants

to supply funds, *pro rata*, for the purchase of The Pullman Company, according to their respective proportions of the aggregate number of sleeping cars operated during the 1940 base period. (R. 1167.)*

After transfer of Pullman to railroad ownership, the company will be recapitalized. Non-transferable, interest bearing notes will be issued by the company, equivalent in principal amount to the valuation placed on heavyweight cars in the computation of the purchase price. The remainder of the purchase price will be represented by the par value of the stock. Both stock and notes will be distributed to the individual railroad subscribers in proportion to their cash contributions. The unique feature of the notes is that the principal amount, although stated in monetary terms, is to be paid in regularly assigned sleeping cars. Upon purchase of such cars, a rail-

* The Memorandum Agreement (R. 1161–1169) refers to the respective proportions of the aggregate of "Cars Operated Plus 20%." The arbitrary addition of 20 percent to the number of cars operated has been used for many years by The Pullman Company in its statistical and contract settlement statements, viz. the manner in which data pertaining to cars operated are reported in the Stipulation. The use of the 20 percent factor is a matter of custom, and car utilization statistics for the 1940 base period were presented in that manner in Pullman's "Plan For Separation of the Sleeping Car Business From the Manufacturing Business" submitted on September 30, 1944. (R. 1166–1167.) While use of the 20 percent factor overstates the number of cars actually operated, it does not alter the relative proportion of car usage assignable to the individual roads.

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road is to tender equivalent face amount of notes, or cash to the extent that it has no notes. Interest on the notes is at the same rate as the rental which Pullman is to pay on leased cars. (R. 1167.)

At the end of the interim period Pullman will own, of its present cars, only the reserve pool of heavyweight cars which were not regularly assigned on or after December 31, 1940, for operation on a particular railroad, and Pullman is to become a sleeping car "service" corporation (R. 1165). As a service company it will offer to contract (1) to perform for all railroads the so-called hotel servicing of sleeping cars, (2) to supply, as available, excess sleeping cars to railroads desiring them and "to maintain such pool of sleeping cars, to the extent required, by the acquisition if necessary of additional sleeping cars" (R. 1184), and (3) to maintain sleeping car equipment owned by any railroad or operate any railroad-owned shop for railroads so desiring (R. 1164).

Although this service company may continue under railroad ownership, it is the expressed intent of the plan that such servicing company be sold to some outside interest. In no event does it anticipate that Pullman will occupy the major role in the furnishing of sleeping cars after the interim period (R. 1164), although it is quite possible that it would be virtually the sole source of pool cars to meet seasonal and other peak needs.

In the event Pullman is not reduced to, or its property sold to, a service corporation by December 31, 1948, any railroad may, within one year thereafter, surrender its Pullman stock and receive its ratable share of Pullman assets; and if Pullman is reduced into a service corporation but is not sold to an "outside" independent interest by December 31, 1948, any railroad may similarly withdraw from Pullman if 33 percent of the Pullman stock consent thereto within the year (R. 1168).

Pullman is to have a board of directors of fifteen members, six to be elected at large and nine to be selected on a regional basis, three from each region, eastern, western and southern (R. 1168–69, 2218).

THE DISTRICT COURT'S APPROVAL OF THE RAIL OFFER

Hearings were held on all four offers (R. 2022–2403). Thereafter, the District Court approved the executory contract made between Pullman Incorporated and the railroad buying group. In approving the rail offer the District Court said that the only relevant issue was whether a joint purchase by railroads doing more than 95 percent of the passenger carrying business in the United States would substitute a railroad monopoly for the original Pullman monopoly. It held that it would not because it had ordered: (1) the complete and perpetual separation of the business of operating and serv-

ing sleeping cars from the business of manufacturing sleeping cars and the complete and perpetual separation of the ownership and control of each business from the ownership and control of the other, regardless of who controls such businesses; (2) abolished the contracts which had given Pullman the exclusive right to furnish, operate, and service slepeing cars on the lines of the several railroads; (3) required that all purchases of new cars, whether by Pullman or by the several railroads, be made only after competitive bidding; and (4) required that Pullman operate and service all cars upon reasonable and non-discriminatory terms, regardless of from whom cars are purchased. These provisions were made applicable to all successors of Pullman (R. 1196–1198).

The court held further that it was necessary to maintain a common pool of cars to meet peak loads and seasonable requirements and that such a pool must be under some sort of unified operation and control (R. 1198).

Finally, the court said that approval of sale to a combination of railroads did not imply disapproval of other bidders; that it approved the rail offer because, pursuant to the Court's direction to sell, Pullman Incorporated appeared with a buyer; that the buyer, the railroads, was the most natural purchaser since such buyer had the legal responsibility for providing sleeping

cars and came in under terms which accorded with the Court's judgment (R. 1199).

On December 26, 1945, the Court entered an order (R. 1202), which required the Pullman Company under its present management to continue to conduct sleeping car service on the lines of the several railroads until March 31, 1946. The purpose of this order was to avoid interruption of sleeping car service during such reasonable time as would be required for the consummation of the sale. On March 4, 1946, the day the appeal was allowed, this order was extended until further order from the Court (R. 1205).

SUMMARY OF ARGUMENT

I

The rail plan approved by the District Court substitutes for the operating and servicing monopoly formerly enjoyed by Pullman, another operating and servicing monopoly to be owned jointly by all of the railroads offering sleeping-car service on their lines. The plan substitutes common ownership for the former exclusive operating contracts. The exclusive operating contracts had bound the rails to the Pullman monopoly. Common ownership is equally binding since under it the rails will be bound by contract with the supplier of the service.

It is apparent on its face that the rail plan vests in the commonly owned Pullman Company

a complete monopoly in the operation and servicing of sleeping cars, at least for the duration of the so-called "interim period," or until December 31, 1948. Such a monopoly is created because under the rail plan all the railroads will be the stockholders, creditors, and customers of the Pullman Company. This 100 percent monopoly is implemented by the requirement in the plan that during such period all cars purchased by the several railroads during such period, whether new or used, or whether lightweight or heavyweight, must be leased back to Pullman for operation and servicing. Thus, individual railroads are compelled to do business with The Pullman Company and everyone else is excluded from the sleeping-car business. The mere existence of such power, without more, is prohibited by the Sherman Act. *American Tobacco Co.* v. *United States,* decided June 10, 1946, Nos. 18–20, last Term.

Since the plan does not make mandatory the requirement that sale of Pullman be made to an independent hotel servicing company by December 31, 1948, the operating and servicing monopoly created during the interim period may continue indefinitely. In fact, the plan anticipates just such a result by providing means for the withdrawal by individual railroads from participation in the plan in the event such a sale is not made.

Under the rail plan there will be no economic incentive for the individual railroads to withdraw and offer sleeping-car service in competition with the commonly-owned company either by operating their own cars or by hiring an independent concessionaire, since to do so would be to compete with a concern in which such roads have a substantial financial stake.

This Court has held that the Sherman Act condemns a monopolization of commerce in a service or commodity which falls far short of complete occupation of the field. *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *Northern Securities Co.* v. *United States*, 193 U. S. 197. *A fortiori*, complete occupation of the field constitutes a prohibited monopolization of commerce.

Had the District Court approved the sale of Pullman to a concern which was completely independent of either Pullman Incorporated or the railroads, the adequacy of its judgment would not be subject to attack under the Sherman Act. At least two offers meeting such requirement were before the Court. It refused even to consider either offer.

II

The monopoly in the operation and servicing of sleeping cars, which the rail plan vests in the commonly-owned Pullman Company, carries with it the inherent power to control the market in

the manufacture and sale of sleeping cars. The single buyer, the rail-owned Pullman Company, is in a position to dictate the type, style, and design, as well as the number of cars to be operated, the roads and routes over which such cars are to be operated, as well as the manufacturer from which new cars may be purchased.

The District Court required the complete separation of ownership and control of the business of operating from the business of manufacturing sleeping cars. Since the operating and servicing monopoly has not been destroyed, but merely has been transferred to new ownership, the separation requirement achieved no more than the removal of an ownership incentive for the continuation of Pullman Standard's existing monopoly in the manufacture and sale of cars. The separation requirement does not prevent the new owners of the operating and servicing monopoly from buying all of their sleeping cars either from Pullman Standard or from some other single concern. The District Court's attempt to remedy this situation by requiring that all cars must be purchased after competitive bidding is not enough. Such a provision can be used only in the event new cars are purchased. If new cars are purchased it can be sidestepped easily by the drafting of specifications in such a way as to permit only a single manufacturer to bid. The additional requirement that Pullman must operate and service all cars tendered by the

railroads without discrimination and without regard to the source of purchase is an attempt to regulate rather than to destroy monopoly power. The existence of the power to exclude, coupled with intent to exclude, even though such power is not exercised, constitutes an unlawful monopoli- v. *United States,* decided June 10, 1946, Nos. 18–20, last Term.

III

The rail plan vests in six railroads the power to control the new operating monopoly, and hence the power to impose unreasonable discriminations against the remaining fifty-two roads offering sleeping-car service on their lines. Stock in the new company is to be owned ratably by the several railroads in the proportion that the number of cars operated on their lines bears to the total number of cars operated on all lines as of the calendar year 1940. Six railroads will own 53.75 percent of the stock in the commonly-owned operating company. In addition, as a result of such stock ownership, these same six roads will have the power to elect at least eight members of the fifteen-member board of directors. Under such circumstances these six roads will have the power, if they choose to exercise it, to impose unreasonable discriminations against the remaining fifty-two roads. Since some of the latter are in active competition with the six controlling roads, it is reasonable to assume that the six roads will

take such advantage of the remaining fifty-two roads as they deem necessary in order to promote their own sleeping-car service.

IV

The rail plan contemplates the destruction of the sleeping-car pool. The Court and all interested parties agreed that the maintenance of a car pool was essential to meet the peak loads of all railroads and the seasonal needs of some railroads. The rail plan provides that the several member roads may purchase all regularly assigned cars during the interim period. As of December 31, 1948, there would remain in the pool only fully depreciated and wholly undesirable cars. The lease-back requirement provides that any cars purchased must be operated on the lines of the buying railroads. Hence, such cars would not be available for pool use even during the interim period. While the plan provides that in the event Pullman is sold to an independent hotel servicing company by December 31, 1948, such company must maintain a pool of cars, the plan also provides that such company will furnish such cars to railroads desiring them only to the extent that cars are available. Even the District Court admitted that it did not think such company would purchase any new sleeping cars.

V

The District Court had both the power and the duty to take such action as would dissipate the

effects of the illegal monopoly which it had struck down. As a court of equity it had the power to order relief which was coterminous with the redress of the wrongs which it found to exist. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185. It had the duty to take such remedial action as would tend reasonably to dissipate the effects of the past monopoly and prevent their recurrence in a different form. *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726. In exercising this power, it unquestionably had large discretion in fashioning an appropriate remedy. But this discretion is not absolute. The District Court could not, in seeking to remedy a violation of the antitrust laws, enter a decree which would have the effect of creating a new violation of the antitrust laws.

The District Court did not properly exercise this power and duty in approving sale of The Pullman Company to a combination of railroads. At least two offers were before the Court which were substantially, if not completely, free from any connections either with the previous Pullman monopoly or with the railroads. Each of these offers met the asking price of Pullman Incorporated for the stock of The Pullman Company. Either of these offers would have provided effective competition in the business of operating and servicing, as well as in the business of manufacturing sleeping cars, since, under

them, there would be two independent interests competing. In the operating and servicing business the independent operating company would compete with the individual railroads. In the manufacturing business the car manufacturers would have two competing sources for car orders; namely, the independent operating company and the several railroads buying cars. Under the rail plan approved by the District Court there can be no effective competition in either the operation or in the manufacture of sleeping cars.

ARGUMENT

We submit that the rail offer approved by the District Court substitutes a monopoly in the operation and servicing of sleeping cars more pernicious than that which the Court declared unlawful. In addition, this new monopoly of operation and servicing is invested with the inherent power to control the manufacture and sale of sleeping cars. Also, the rail plan vests in six railroads the power to control the commonly-owned operating and service company. Such control will vest in these six railroads the power to impose unreasonable discriminations against the remaining fifty-two railroads operating sleeping-car service on their lines. Finally, the rail plan will destroy the sleeping-car pool.

I

COMMON OWNERSHIP OF THE OPERATION AND SERVICING OF SLEEPING CARS BY A COMBINATION OF ALL RAILROADS ON WHOSE LINES SLEEPING CAR SERVICE IS OFFERED IS IN ILLEGAL RESTRAINT AND MONOPOLIZATION OF INTERSTATE COMMERCE

The consequence of the District Court's approval of the sale of Pullman to the railroads would be to establish a *per se* violation of the Sherman Act. Under such plan the railroads offering sleeping-car service on their lines are vested with a complete monopoly in the operation and servicing of sleeping cars. In approving the rail plan the District Court merely substituted a rail-owned monopoly for the former Pullman-owned monopoly.

The District Court held that the illegal nature of the original Pullman monopoly resulted from the fact that Pullman had acquired a complete monopoly of the market in the furnishing and servicing of sleeping cars; that it had achieved such monopoly by acquiring ownership of all existing equipment and rolling stock adaptable to such purpose; that the monopoly so acquired was strengthened and perpetuated by contracts between Pullman and the several railroads which required that the railroads give to Pullman the exclusive right to furnish, operate, and service all sleeping cars operated on the lines of the contracting railroads (R. 740–742). It held further that the incentive for the railroads to

break away from Pullman was weakened further by the requirement that the contracting railroads acquire a financial stake in Pullman by paying a substantial pro rata share of depreciation on all cars operated on their respective lines, by paying for the amortization of high speed betterments and air conditioning, and by paying out as operating expenses for repairs items which were actually capital expenditures; that the rails benefitted by this financial stake since, upon the periodic renewal of the operating contracts, the cars were rented to the rails on the basis of their depreciated value (R. 736–738). It held that the exclusive operating contracts, as well as the substantial stake which the rails had in Pullman, prevented the contracting railroads from contracting for the service of any competing concessionaire or from buying and operating their own sleeping cars (R. 740–741).

It is apparent on its face that the rail plan vests in the commonly-owned Pullman Company a complete monopoly of the market in the operation and servicing of sleeping cars at least for the duration of the interim period. This is true because, under the rail plan, all the railroads would be stockholders, creditors and customers of The Pullman Company. To insure the effectiveness of this 100 percent monopoly, the plan provides that all cars purchased by the railroads during such period, whether new or used, and

whether lightweight or heavyweight, must be leased back to Pullman for operation and servicing. (R. 1165.) Under the original Pullman monopoly the exclusive contracts, as well as the financial stake of the rails in Pullman, prevented the rails either from owning and operating their own sleeping cars or from hiring an outside concessionare. As stated, under the rail-approved plan all cars must be leased back to Pullman for operation and servicing for the duration of the interim period. This requirement, implementing outright ownership of the enterprise (which is substituted for the partial financial stake which the rails had in the former company), makes it impossible for an individual railroad either to furnish, operate, and service all or a part of its sleeping-car service or to hire an outside concessionaire to furnish such service. Indeed, under the rail plan it would be impossible for anyone else to get into the sleeping car business. The power to exclude all others from the field is absolute. This, without more, is a type of monopoly condemned by the Sherman Act. *American Tobacco Co.* v. *United States,* decided June 10, 1946, Nos. 18–20, last Term.

In approving the rail plan the District Court saw no danger in the perpetuation of Pullman's operating monopoly. It reasoned that Pullman got into trouble not because it was the only company furnishing sleeping-car service, but rather because

Pullman had made it impossible for any other company to get into the business; that this applied not only to a competing concessionaire, but to a railroad which sought to operate a part of its own sleeping-car service and permit Pullman to operate the remainder. It said that such restrictions had been struck down by its original judgment which declared unlawful the exclusive furnishing and servicing contracts; permitted any railroad to join with others and use the services of Pullman; permitted any railroad to operate a part of its sleeping-car service, or through an outside concessionaire, with Pullman doing the remainder. Under such circumstances the District Court held that there was no strangle-hold on the sleeping-car business by a rail-owner Pullman Company or by anyone else, and hence no unlawful monopoly. (R. 1197–1198.)

There are two fundamental errors in this reasoning. First, it ignores the fact that under the rail plan all cars, regardless of ownership, and regardless of from whom such cars are purchased, must be leased back to Pullman for operation and servicing for the duration of the interim period (R. 1165). Such mandatory requirement gives Pullman a complete strangle-hold on the sleeping-car business for the interim period. During such period no railroad can operate and service its sleeping cars, either in

whole or in part; nor can it hire an outside concessionaire to operate such service, either in whole or in part.

Second, the District Court failed to recognize the difference in fact between ownership of the sleeping-car business by a concern truly independent of any of its customers, and ownership by a combination of railroads constituting all of its actual and potential customers in the United States. Had the District Court approved sale of Pullman to a company in which the several railroads had no financial interest or control, its reasoning with respect to the adequacy of its judgment in destroying the Pullman monopoly in the operation and servicing of sleeping cars would be sound. Under such circumstances the several railroads would have an economic incentive to exercise the privilege either of operating their own sleeping-car service or of employing the services of others. There would be a truly competitive market for the operation and servicing of sleeping cars. The individual railroads could compete and would have the economic incentive to compete with such independent operating company.

Under the plan approved by the District Court, however, it is unrealistic to suppose that any railroad would compete with the commonly-owned company even in the absence of the lease-back requirement which makes such competition im-

possible. Even if an individual railroad member of the buying group did operate and service its own cars, it would be competing with the commonly-owned company in which it has a substantial stake. Likewise, if an individual railroad member of the buying group should hire an outside concessionaire to furnish, operate, and service sleeping cars on its lines, such outside concessionaire would be competing with the commonly-owned sleeping-car company in which such railroad is a stockholder and a creditor.

In the original antitrust suit the District Court found it objectionable that the railroads were coerced to renew their operating contracts with Pullman because such railroads had a financial stake in the ownership of the cars. Yet the same court approved the rail plan, which enlarged that financial stake to the full ownership of the entire enterprise. The monopoly in the furnishing and servicing of sleeping cars is thus entrenched.

Another fallacy inherent in the competitive argument advanced by the District Court lies in the fact that even though the lease-back requirement was not a part of the rail plan, the choice of whether competition will exist is left wholly to the determination of the individual roads which dominate the combination. Competition will or will not exist depending upon the whim of the monopolist, rather than upon the normal play of free competition. Certainly no

open market will be available to an outside concessionaire.

Nor is there any economic incentive for an individual railroad to compete with the commonly-owned sleeping car company since to do so would be to compete with a company in which such individual railroad has a substantial financial stake. To sustain a charge of monopoly it is only necessary to show that prospective or potential competitors are denied the practical opportunity to compete. (See *United States* v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383, 409.)

By the terms of the rail plan approved by the District Court, the commonly-owned Pullman Company is vested with a complete monopoly in the operation and servicing of sleeping cars at least for the duration of the interim period. This Court has held repeatedly that the Sherman Act condemns a monopolization of commerce in a service or in a commodity which falls far short of complete occupation of the field. The so-called "merger cases" are illustrative. *United States* v. *Reading Co.,* 253 U. S. 26; *United States* v. *Southern Pacific Co.,* 259 U. S. 214; *United States* v. *Union Pacific Railroad Co.,* 226 U. S. 61; *Northern Securities Co.* v. *United States,* 193 U. S. 197. In each of these cases there was substantial existing competition even after merger. In the *Union Pacific* case this Court, in condemn-

ing the purchase by the Union Pacific of a controlling interest in the Southern Pacific, said that "it is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act." (p. 88) In the *Southern Pacific* case this Court refused to permit the Southern Pacific to purchase a controlling interest in the Central Pacific Railway Company despite the fact that the lines of the two roads had been operated as a unified system for fourteen years. It was there said that "one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." (pp. 230–231.)

If common ownership of transportation facilities which falls far short of complete occupation of the field violates the Sherman Act, then, *a fortiori,* common ownership of all the sleeping-car business in the country is unlawful. In essence, the rail plan creates a closed market for the members of the combination. Under it the members of the commonly-owned company have the power to exclude all competition in the operation and servicing of sleeping cars. Certainly there is a prohibited monopolization of commerce, even in the absence of actual exclusion, where all

existing potential competitors combine in a single company to operate and service all of the sleeping cars. To argue otherwise would be equivalent to the emasculation of the Sherman Act. *United States* v. *Aluminum Company of America*, 148 F. (2d) 416, 431 (C. C. A. 2).

What we have said thus far about the District Court's substitution of a commonly-owned rail monopoly in the operation and servicing of sleeping cars for the previous Pullman monopoly in operation and servicing, applies to the situation as it will exist during the interim period, or until December 31, 1948. The question may be raised as to whether the monopoly which would exist during this interim period should be disregarded if the rails can be relied upon to carry out the purpose expressed in the plan to sell Pullman to an independent purchaser by December 31, 1948. The approved plan contains a declaration of intention that at the end of the interim period Pullman shall have sold all of its regularly assigned cars to the rails and shall be reduced to a "hotel" servicing company, owning a small number of cars to be operated as a pool. The plan contains a further declaration of intention that after such reduction in the scope of Pullman operations the enterprise shall be sold to an "independent" purchaser (R. 1164).

The difficulty with this is two-fold. First, it is significant that the plan does not make mandatory

either reduction to a "hotel" servicing company or sale of such company to an "independent." Indeed, the plan contemplates that these purposes may not be accomplished by providing remedies available to the railroads which are parties to the agreement. It provides that if Pullman has not been reduced into, or its properties sold to, a service company, by December 31, 1948, any railroad which is a party to the agreement may withdraw within a year thereafter by the surrender of its stock and shall recover its ratable share of corporate assets. It provides further that if, by December 31, 1948, Pullman has been reduced to a service company, but such service company has not been sold to an outside independent interest, any railroad may withdraw within a year thereafter provided the owners of 33 percent of the total stock consent (of which not more than one shall be one of the two largest stockholders). (R. 1168.) Such remedies afford a clear indication that the sponsors of the plan do not contemplate enforcement of its stated purposes, but on the contrary provide a means of withdrawal to any dissatisfied railroad.

Second, the determination of who is an "independent" purchaser, as well as the circumstances under which such purchaser would enter into the business is left to the judgment of the combining railroads, without any requirement for judicial approval. The plan delegates such power

to the rails. (R. 1164.) Under such circumstances the new company would be independent in name only. Since it would be the nominee of the several railroads, its selection would be governed by its commitment to a policy of sleeping-car transportation dictated by the combination of railroads. The rail plan permits the tort-feasor, Pullman Incorporated, to select its successor, a combination of railroads, with court approval. At the end of three years this combination of railroads is permitted to select its successor in the absence of any approval by the District Court.

If we disregard the unlawful monopoly in the operation and servicing of sleeping cars which would exist during the interim period; and further, if, at the expiration of such period, sale of Pullman were made to a truly independent concern, there might be at that time no violation of the Sherman Act. But if this is all the plan is intended to accomplish, then why the interim period? Why not a sale now to a truly independent purchaser? Why not a sale now to an actual purchaser with money in hand whom the District Court knows to be independent, rather than a long wait for a hypothetical purchaser to be created by the interested railroads?

Even though Pullman were sold to a company truly independent of the railroads by December 31, 1948, such company would have no adequate

fleet of cars since the rail plan provides for the virtual destruction of the car pool during the interim period by the requirement that the rails must purchase immediately all lightweight cars regularly assigned and must purchase by December 31, 1948, all regularly assigned heavyweight cars (R. 1165–1166). This feature of the rail plan is argued under Point IV, at pages 49–53.

At least two independent purchasers made offers which met the asking price of Pullman Incorporated for the purchase of The Pullman Company. The District Court refused to consider the merits of either proposal, saying (R. 1199):

> Approval of the sale to the railroads does not imply disapproval of the other bidders. We are much impressed with all of them. We do not approve Pullman's selection because it has chosen the bid that brings it what it regards as the most favorable terms. We approve it because, following our direction to sell, it now appears with a buyer. That buyer is, as we said above, the most natural purchaser, because it has the legal responsibility for providing sleeping cars and comes in under terms which we are satisfied are in accordance with the judgment of this Court.

We submit that the rail plan approved by the District Court vests in the Pullman Company a more vicious monopoly in the operation and

servicing of sleeping cars than the monopoly which the same court condemned in the original antitrust suit; that the rail plan merely substitutes common ownership by the rails for the former exclusive operating contracts which prevented the individual railroads either from operating and servicing their own sleeping cars or from hiring a concessionaire independent of Pullman to operate and service such cars; that that under common-rail ownership there will be no economic incentive for the several railroads to operate and service their own cars or to hire an independent concessionaire for that purpose since each road will be a stockholder, creditor and customer of the commonly-owned Pullman Company; and that the rail plan substitutes full rail ownership for the partial financial stake which Pullman formerly forced on the contract railroads to tighten and perpetuate its monopoly in the operation and servicing of sleeping cars. We submit further that the rail plan actually contemplates the indefinite perpetuation of such monopoly control by its failure to make mandatory the provision for sale of Pullman to an independent operating company at the end of the interim period, as well as the several escape clauses inserted in the plan to accommodate any dissatisfied railroads.

II

THE RAIL PLAN VESTS IN THE COMMONLY-OWNED OPERATING AND SERVICING COMPANY THE INHERENT POWER TO CONTROL THE MARKET IN THE MANUFACTURE AND SALE OF SLEEPING CARS

The monopoly in the operation and servicing of sleeping cars carries with it the inherent power to control the market in the manufacture and sale of sleeping cars. The sole function of a sleeping car is to provide accommodations for the public using that type of transportation. Unless all of the necessary services and facilities for the operation of such car are available the car is useless. Ownership of cars is important only as such cars are operated and serviced properly on the lines of the several railroads. Except for scrap value, no one can be expected to purchase sleeping cars for which no operating facilities and services are available.

Since, under the rail plan, the commonly-owned Pullman Company has a complete monopoly in the operation and servicing of sleeping cars, the new Pullman Company is in a position to dictate the type, style, and design, the number of cars to be operated, the roads and routes over which such cars are to be operated, as well as the manufacturer from which new cars are to be purchased, through the simple device of refusing to operate and service any cars except those designated by it. Just as the original Pullman Company used its operating and servic-

ing monopoly to acquire a furnishing and manufacturing monopoly, so too may the court-approved commonly-owned rail monopoly of operation and servicing exercise the power inherent in it to control the concern or concerns which manufacture sleeping cars. It need not be control based upon any of the normal indicia of ownership. It would be control based upon complete monopoly of the available market for sleeping cars.

In approving the rail plan the District Court recognized that Pullman-Standard's original monopoly in the manufacture of sleeping cars resulted from Pullman's control over the market in the operation and servicing of sleeping cars since Pullman would purchase, operate, and service only those cars manufactured by Pullman-Standard (R. 1196). The District Court erred, however, in asserting that under the rail plan neither Standard nor anyone else would have a monopoly in the manufacture and sale of cars. This assertion was based upon the erroneous assumption that no one would have a monopoly in the operation and servicing of sleeping cars. (R. 1196.) It reasoned further that its original judgment requiring the complete separation of the business of manufacturing from the business of operating and servicing sleeping cars (R. 766), as well as requiring that Pullman must operate and service any sleeping car owned by any railroad on reasonable and non-discriminatory terms

(R. 779), had been buttressed by the final judgment requiring that all new sleeping cars be purchased after competitive bidding, whether purchased by Pullman or by the individual railroads (R. 1197).

The District Court's error in assuming that sale of Pullman to a combination of all the railroads offering sleeping-car service on their lines would not substitute a new monopoly for the one previously struck down was discussed under Point I of this brief. Since the operating and servicing monopoly has not been destroyed but merely has been transferred to new ownership, the separation requirement achieves no more than the removal of an ownership incentive for the continuation of Pullman-Standard's existing monopoly in the manufacture and sale of cars. The separation requirement does not prevent the new owners of the operating and servicing monopoly from buying all cars either from Pullman-Standard or from some other car manufacturer. Indeed, since the District Court permitted Pullman Incorporated to select its own successor in the operating and servicing business, such successor, the rails, might very well feel a deep obligation to favor Pullman-Standard in placing orders for cars since Pullman-Standard is to remain in the ownership of Pullman Incorporated.

The competitive bidding requirement will apply only in the event that new cars are purchased.

If the new operating company should decide to get along with the existing fleet which consists largely of obsolete cars; if it should adopt the past Pullman policy of scarcity, of refusal to expand, then the competitive bidding requirement would be useless with respect to Pullman because Pullman would buy no new cars. Under such a policy there would be no opportunity for the development of competition in the manufacture and sale of cars. In the event Pullman should purchase new cars the competitive bidding requirement of course would be applied. But it could be sidestepped neatly by the control by Pullman of specifications with respect to style, type, and design of cars in such a way as to enable only a particular manufacturer to bid.

The individual railroads could purchase new cars under competitive bidding, but such purchases would be useless in the event Pullman refused adequate operating and servicing facilities to cars so purchased. Under the original Pullman monopoly the individual railroads had the right to purchase new cars from any manufacturer but such right could not be exercised because of Pullman's refusal to operate and service any cars except those manufactured by Pullman Standard.

The only provision in the District Court's judgment which might tend to prevent the newly created operating monopoly from creating a new

monopoly in the manufacture and sale of cars by refusal to operate and serve only those cars designated by it, is the requirement that such operating company must operate and service any and all cars tendered by the railroads without discrimination regardless of from whom such cars are purchased. But there is no formula under which a court can regulate the quality of service to be rendered by the new operating monopoly in the absence of any compelling economic incentive. Neither is there any formula under which a court can prevent the new operating monopoly from providing a quality of service which is tantamount to a refusal to serve.

The District Court sought to prevent the newly-created operating monopoly from exercising its inherent power to create a new, or to perpetuate the former manufacturing monopoly, by regulating the new operating monopoly. The District Court attempted merely to regulate rather than to destroy monopoly power. Such an attempt at regulation does not satisfy the requirements of the Sherman Act for a free market. In the *Tobacco* case[1] this Court said that the Sherman Act is concerned primarily with the possession of monopoly power by those who have demonstrated an intention to abuse it. Destruction of such power by judicial decree should

[1] *American Tobacco Company* v. *United States*, decided June 10, 1946, Nos. 18–20, last Term.

follow a finding of such abuse. In situations where Congress has intended to recognize the continued existence of such power it has established an appropriate administrative agency to regulate it, rather than commit to the courts the kind of regulatory task implicit in the decree entered below.

The District Court, having found that a monopoly exists, should have destroyed it. In this case a way was open to destroy the existing monopoly by approving sale of the operating company to either of two concerns which were substantially free of any connections either with Pullman Incorporated or with the railroads. The District Court refused even to consider such offers.

The new operating monopoly has in it the inherent power to exclude competitors in the operation and servicing as well as in the manufacture and sale of sleeping cars. Even assuming that the regulatory features imposed by the court were sufficient to prevent serious abuses by the newly-created operating monopoly, such concern still is vested with the inherent power to abuse its position. It can exclude from both markets, operating and manufacturing, anyone it desires to so exclude.

The power to exclude competitors encompasses all the other powers which render monopoly obnoxious. The power to exclude has been regarded always as the essence and distinguishing

characteristic of monopoly. Condemnation of such a power is a practical necessity. Its mere existence has a repressive effect on commercial competition. The history of the Sherman Act is replete with illustrations showing that possession of such power leads inevitably to its exercise. One need go no further for such proof than the original proceedings in this case. While it is impossible to measure the repressive effect of monopoly power before it is exercised, any requirement that such effect must be demonstrated would be the practical equivalent of nullifying the prohibition. In the *Tobacco* case, *supra,* this Court held that power to exclude and intent to exclude, even though unexercised, constitutes an unlawful monopolization of commerce.

III

THE RAIL PLAN APPROVED BY THE DISTRICT COURT VESTS IN SIX RAILROADS THE POWER TO CONTROL THE PULLMAN COMPANY AND HENCE THE POWER TO IMPOSE UNREASONABLE DISCRIMINATIONS AGAINST THE REMAINING FIFTY-TWO RAILROADS OFFERING SLEEPING CAR SERVICE ON THEIR LINES

Under the rail plan approved by the District Court each member road of the Buying Group is to purchase stock in the commonly-owned company, ratably, in accordance with the percentage relationships which the number of Pullman cars operated by such road during the calendar year 1940 bears to the total number of sleeping cars operated on all roads as of that calendar year.

(R. 1167.) Such a plan will vest in six railroads, namely, Pennsylvania, New York Central, Southern Pacific, Union Pacific, Santa Fe, and Southern, control of a majority of the stock in the commonly-owned company; to-wit, 53.75 percent. (R. 803–804.)

The same six roads would have the power to control a majority on the board of directors of the commonly-owned Pullman Company. The rail plan provides for a board of directors consisting of fifteen members. Six of the fifteen members are to be elected at large. Of the remaining nine members, three each are to be elected from each of three regions, eastern, western, and southern. (R. 1168–1169, 2218.) Since the six roads mentioned will control 53.75 percent of the stock, even with all roads participating which offer sleeping-car service, such roads will have the power to elect a majority or four of the six directors to be selected without regard to geographical qualifications. Since the roads in the eastern region do 47.01 percent of the total sleeping-car business in the United States, (R. 803–804), and since the Pennsylvania and New York Central do 30.51 percent of the total nationwide business, (R. 803–804) or 64.9 percent of the total business done in the eastern region, these two roads will have the power to elect at least two of the three directors to be selected from that region. Similarly, the roads in the

western division do 38.71 percent of the total sleeping-car business in the United States, (R. 803–804) and three roads, the Southern Pacific, Union Pacific, and Santa Fe, do 19.41 percent of the nation's total (R. 803–804) or 50.14 percent of the sleeping-car business in the western region. Hence, these three roads will have the power to elect at least two of the three directors to be selected from that region. Six railroads, therefore, will have the power to control the board of directors of the commonly-owned company by electing at least eight of the fifteen members.

Six roads will have the power to control the sleeping-car business of the remaining fifty-two roads providing sleeping-car service on their lines. Such power could easily be used to impose unreasonable discriminations against the remaining fifty-two roads. There is nothing in the rail plan, or in the District Court's judgment approving such plan, which is calculated to prevent the imposition of unreasonable discriminations. Since many of the fifty-two roads representing the minority stock interest are in active competition for sleeping-car business with the six controlling roads, it is not unreasonable to assume that the latter will take such advantage of the former as they deem necessary in order to promote their own sleeping-car service.

It is pertinent in this regard to point out that in spite of the complete monopoly in operating,

servicing, furnishing, and manufacturing enjoyed by Pullman prior to the conclusion of the original antitrust suit, the Pennsylvania and New York Central had sufficient bargaining power as a result of operating on their lines approximately 30 percent of all Pullman cars and earning approximately 35 percent of all Pullman operating revenues (R. 803–804) to secure economic advantages from Pullman which were not available to any of the other railroads. For example, for many years Pullman favored these two roads by giving them a larger proportionate share in Pullman revenues than other roads by absorbing for them various categories of train operating expenses which Pullman required all other roads to absorb. (R. 1980–1983.) Since it was Pullman's practice to average operating expenses over all cars operated, the practice just mentioned resulted in transferring cost of operation on the Pennsylvania and New York Central to the smaller roads in the Pullman system.

IV

THE RAIL PLAN APPROVED BY THE DISTRICT COURT PROVIDES FOR THE DESTRUCTION OF THE SLEEPING-CAR POOL

The rail plan approved by the District Court requires that the railroads to which lightweight cars are assigned shall purchase them from Pullman before the cut-off date.[8] The plan provides

[8] Originally set for December 1, 1945 (R. 1162).

further that upon demand of any Pullman contract railroad, the rail-owned Pullman Company shall offer to sell to such railroad during the interim period any existing sleeping car which was regularly assigned to operation on that railroad at the end of the calendar year 1940 or thereafter, and which was not permanently released from such assignment. In addition, the plan requires that Pullman shall offer to sell unassigned cars to the extent that such cars are deemed by Pullman to be unnecessary to the performance of its own functions under the plan. (R. 1165.)

It is apparent that the plan contemplates the destruction of the car pool during the interim period since it provides that the several railroads may purchase all of the regularly assigned cars by December 31, 1948 (R. 1165). While all cars purchased must be turned back to Pullman for operation and servicing during the interim period they cannot be shifted from road to road to meet peak load and seasonal demands since they will be the property of the purchasing railroads rather than the property of Pullman. Hence, there is no guarantee that an adequate pool will be maintained during the interim period since the only cars that will be available for pooling will be those which are not purchased by the several railroads.

Even if Pullman should be converted into a hotel servicing company and sold to an "inde-

pendent" by December 31, 1948, there would still be no adequate pool of cars since the rails would have purchased all of the serviceable cars during the interim period. While the rail plan was amended so as to require such hotel company to maintain a pool of cars "by the acquisition if necessary of additional cars" (R. 1184) such amendment provides also that Pullman will furnish and service sleeping cars to railroads so desiring only "to the extent that it has sleeping cars available" (R. 1184). The District Court also recognized that the hotel company would not likely purchase new cars, saying: "We do not think it likely that the Pullman Company, itself, will purchase new sleeping cars." (R. 1197).

While the Government has always insisted upon the right of the individual railroads to own, operate, and service their own sleeping cars in competition with any company offering service from a pool of cars, we have also consistently argued that maintenance of a modern pool of sleeping cars is essential to meet the peak loads of all roads and the seasonal demands of particular railroads. The District Court likewise recognized the necessity for such a pool by saying in its opinion in the original antitrust suit that (R. 735–736):

> Even if a railroad could buy the cars it needed for ordinary day-to-day use there is still the problem of extra cars for

peak loads. All roads have certain periods when the demands increase sharply. But in some, like the Missouri Pacific, Baltimore & Ohio, Southern Pacific, and the Pennsylvania, the variation, while perceptible, is comparatively slight throughout the year. Others, like the Florida East Coast, Seaboard, Boston & Maine, Burlington, and Northern Pacific have a large amount of seasonal passenger travel in extreme peaks and deep depressions. For instance, the Florida East Coast Railway's requirements may vary from 319 cars in the height of the season to 28 in the dull season. Conversely, those of the Boston & Maine go from a maximum of 173 in summer to a minimum of 54 in winter. The pool of sleeping cars that can be shifted from one road to another as demands vary is called for by sound economic policy. The plaintiff in this suit does not deny this fact and this Court appreciates it fully. It is relevant to be considered in this connection when the practicability of the operation of any railroad's sleeping cars is to be considered.

Again in its opinion approving the rail plan the District Court said (R. 1198):

> The necessity of a reserve pool of cars to meet peak loads of all and seasonable requirements of some of the roads was discussed in the main opinion in this case. In the nature of things, this must be a

common pool, with some sort of unified operation and control, if it is to be effective.

Although the District Court admitted the necessity of a common pool it did not think the rail plan would provide such a pool in the event of sale to an "independent" hotel servicing company. We submit that on its face the rail plan destroys the car pool, even during the interim period, in the sense that cars can be shifted from road to road by a central authority, and that no adequate pool could be maintained by an independent hotel servicing company after December 31, 1948, even in the highly unlikely event that such a concern should be created.

V

A COURT, IN ORDERING SALE OF A BUSINESS PURSUANT TO AN ANTITRUST DECREE INTENDED TO DESTROY A FORMER MONOPOLY, CANNOT ENTER A DECREE WHICH WILL HAVE THE EFFECT OF CREATING A NEW VIOLATION OF THE ANTITRUST LAWS

In the original antitrust suit the District Court found that Pullman had acquired a complete monopoly in the operation and servicing of sleeping cars by the purchase of all competitors; that it had used this monopoly to create for itself a monopoly in the manufacture of sleeping cars; that it protected its operating monopoly by requiring that the contract roads hire Pullman exclusively and acquire a financial stake in Pull-

man; that it protected its manufacturing monopoly by refusing to operate and service any cars except those manufactured by Pullman Standard. It attempted to strike down the manufacturing monopoly by ordering the complete separation of the business of manufacturing from the business of operating sleeping cars. It attempted to destroy the operating monopoly by eliminating the exclusivity features of the operating contracts.

In approving sale of Pullman to a combination of all the railroads operating sleeping-car service on their lines, the Court created a new monopoly as unlawful as the one which it had declared unlawful. It struck down the exclusive operating contracts which had bound the rails to the Pullman monopoly and then substituted for such contracts common ownership by the rails, which is equally binding since under it the rails will be bound by contract with the supplier of the service. It ordered separation of manufacture from operation, but created a new operating monopoly with inherent power to perpetuate a manufacturing monopoly in a single concern. It permitted the law violator to choose its own successor. It approved a plan which gives to six railroads the power to control the sleeping-car business of the remaining fifty-two roads. It held that maintenance of a car pool was essential and in the public interest, and then approved a plan which destroys such a pool.

The District Court discovered the wrong, but failed to devise an adequate remedy. A court of equity is under a duty to "award relief coterminous with the ultimate redress of the wrongs" which it finds to exist. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185. Such a court has power "to mould each decree to the necessities of the particular case." *Hecht Company* v. *Bowles*, 321 U. S. 321, 329. We do not insist that the District Court was under a duty to devise the best remedy available. "The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions." *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726. In exercising its equity power, the District Court unquestionably had wide discretion in fashioning an appropriate remedy. But this discretion was not absolute. A District Court cannot, in seeking to remedy a violation of the antitrust laws, enter a decree which would have the effect of creating a new violation of the antitrust laws. We say that that is precisely what the District Court did here in approving the rail offer to purchase The Pullman Company. It failed to give any real relief from the effects of the monopoly which it had previously declared unlawful.

At least two offers were before the Court which were substantially, if not completely, free from any connections either with the previous Pullman

monopoly or with the railroads. Both offers met the asking price of Pullman Incorporated for the purchase of the stock of The Pullman Company. Had either offer been approved an opportunity would have been created for effective competition at both the operational and the manufacturing levels. At the operational level the independent operating company could compete with the several railroads for the sleeping-car business. If any individual railroad was dissatisfied with the service offered by such concern, such railroad could operate and service its own sleeping cars or hire another concessionaire to furnish such service. There would be an incentive for such competition, since the rails would not own a stake in such company. Likewise, at the manufacturing level the car manufacturers would have at least two markets for sleeping cars, the independent operating company and the several railroads. If the District Court had approved the sale of Pullman to a concern independent of Pullman Incorporated and the railroads there would be at least three independent groups whose economic best interests would force the development of better equipment and expanded service; namely, (1) two or more car manufacturers; (2) the concern owning and operating sleeping cars; and (3) the railroads who would demand the best in both equipment and service for their patrons.

With such a choice before it, the District Court refused to consider either offer. It selected the bidder least qualified to dissipate the effects of the past monopoly. It permitted the law violator to choose its own successor. It justified such selection by saying merely that Pullman Incorporated had been ordered to sell; that it had appeared with a buyer; that such buyer was the most natural and obvious party to conduct the sleeping-car business because the buyer, the railroads, had the legal duty to furnish sleeping-car service; and that such buyer came in under terms which accorded with the Court's judgment (R. 1199). In approving the rail offer the Court made no effort to determine the ability of the railroad group either to bring an end to the monopoly which it had condemned or to dissipate its effects. It ignored the failure of the rail plan to provide any means for an expanding sleeping-car service, yet the basic evil at which the original antitrust suit was directed was the failure of Pullman to furnish adequate and modern sleeping-car service to all the railroads on reasonable and non-discriminating terms. The District Court's approval of the rail offer merely perpetuates the old evil in a different setting.

CONCLUSION

For the reasons stated, the decision below should be reversed and the case remanded to the District Court for the purpose of entering a new

remedial decree which would adequately dissipate the effects of the monopoly it had found, without giving rise to a new one.

Respectfully submitted.

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FEBRUARY 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947